

NO. 41371-0-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

CONSOLIDATED CASES

JENNIFER HELGESON and ANDREW HELGESON,
Appellants,

v.

VIKING INSURANCE COMPANY OF WISCONSIN, a foreign corporation,
d/b/a SENTRY INSURANCE, d/b/a, DAIRYLAND INSURANCE,

Respondent.

VIKING INSURANCE COMPANY OF WISCONSIN, a foreign corporation,
Respondent,

v.

JENNIFER HELGESON and JOHN DOE HELGESON, and their marital
community, and ANDREW HELGESON,
Appellants.

APPELLANT'S OPENING BRIEF

December 20, 2010

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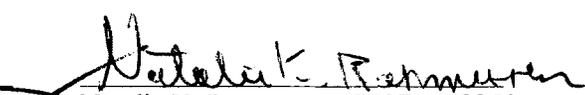

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I. INTRODUCTION

Jennifer Helgeson is a resident of Kitsap County. She resides with her son, who was a minor at the time of this incident. CP 197-198. Ms. Helgeson and her son will be collectively referred to as the “Helgesons” for the purposes of this brief.

Viking Insurance Company of Wisconsin is hereinafter referred to as “Viking”. Viking is a foreign insurance company doing business in Washington State. CP 10.

This case involves the extent of Underinsured Motorist Coverage extended to the Helgesons under an insurance policy (hereinafter “Policy”) issued by Viking to Jennifer Helgeson. CP 33-49. The Policy is subject to a Broad Form Named Driver Endorsement (hereinafter “Endorsement”) which is central to this case. CP 47-49. Viking used the Endorsement as its basis for denial of the Helgesons’ claim for UIM coverage for Andrew Helgeson under the Policy.

II. ASSIGNMENTS OF ERROR

1. The trial Court erred in granting Viking Insurance Company’s Motion for Summary Judgment declaring that the Helgesons are not entitled to underinsured motorist benefits under the Policy that Viking Insurance Company of Wisconsin issued to Jennifer Helgeson. CP 203-5.

2. The trial court erred in denying the Helgesons' Motion for Summary Judgment to void the Endorsement contained in the Policy Viking sold Jennifer Helgeson. Id.

3. The trial court erred in denying the Helgesons' Motion for Summary Judgment to find Viking in breach of its contract with Jennifer Helgeson. Id.

4. The trial court erred in denying Helgesons' Motion for Summary Judgment declaring that Viking's denial of UIM coverage to Andrew Helgeson is in violation of the Insurance Fair Conduct Act. Id.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

Since the cross motions for summary judgment at the trial court revolve around a single common question of law, the issues relating to the assignments of error address all of the assignments of error in Paragraph II above.

1. Does the Endorsement issued by Viking exclude the mandatory UIM coverage required under RCW 48.22.005?

2. Does established public policy in Washington State prohibit denial of UIM coverage to minor children of a named insured?

3. Does established public policy in Washington State prohibit family member exclusions in insurance contracts?

4. Is Viking's denial of UIM coverage to Andrew Helgeson unreasonable and a violation of the Insurance Fair Practices Act under RCW 48.30.015?

IV. STATEMENT OF THE CASE

A. Factual Background

The facts surrounding this action are not in dispute. On October 5, 2008, Mrs. Helgeson purchased automobile insurance coverage through Viking. CP 33-45. The policy she purchased contained a "Broad Form Named Driver Endorsement" ("Endorsement"). CP 47-49. The Endorsement limited the insurance coverage available to Mrs. Helgeson and her family by amending the term "you" and "your" as used in the policy from "the person shown as the named insured on the Declarations Page and that person's spouse if residing in the same household" as well as "any relative [of the named insured] if they reside in the same household," to only including "the person shown as the named insured on the Declarations Page." CP 36; CP 47. Mrs. Helgeson was the person shown on the Declarations Page, and as such, was the named insured. CP 33-34.

An insured person under the medical payments coverage portion of the Viking Policy is defined as: “(1) You while occupying your insured car. (2) You as a pedestrian when struck by a motor vehicle.... (3) Any other person while occupying your insured car while the car is being used by you.” CP 47.

An insured person under the Underinsured Motorists (“UIM”) Coverage portion of the Viking Policy includes: “(A) You. (B) Any other person occupying your insured car with your permission.” *See Id.* Although Mrs. Helgeson did not pay a separate premium for UIM coverage, Viking does not have a written rejection of UIM coverage for Mrs. Helgeson. CP 90.

On February 3, 2009, Mrs. Helgeson’s then minor son, Andrew Helgeson, was seriously injured when he was struck by a car as a pedestrian on South Kingston Road, NE, in Kingston, Washington. CP 51-61. The injuries Andrew sustained included multiple contusions, cervical spine injury, fracture of the lower right extremity, hip fracture, hemothorax, intraabdominal bleeding, anemia and compartment syndrome. CP 62-63. Andrew also had to undergo surgery to place a rod in his right leg to treat the multiple fractures. CP 65-67. Andrew will have to undergo another surgery to remove the rod in his right leg.

Although the negligent driver who hit Andrew was insured through an automobile insurance policy, her liability limits are insufficient to cover the cost of Andrew's medical treatment. *See* Medical Bills Exhibit 6. Andrew thus made a claim as an insured against his mother's UIM coverage carried by Viking for the maximum policy limits of \$25,000; an amount which, due to the extent of Andrew's injuries and the cost for treatment of these injuries, will still leave Andrew not fully compensated for the damage resulting from this accident.

On December 22, 2009, Viking disclaimed and denied any and all liability or obligation to provide UIM coverage to Andrew. CP 81-82.

On March 18, 2010 Mrs. Helgeson served the Office of the Insurance Commissioner and Viking notice of the basis of this cause of action, pursuant to RCW 48.30.015(8)(a). CP 84-85. This notice was served more than 20 days prior to the filing of this action, which occurred on May 17, 2010.

Viking admits that it does not have a signed waiver of UIM coverage from Mrs. Helgeson. CP 91. Because of the lack of a written waiver, Viking concedes that the insurance contract Viking sold Mrs. Helgeson includes UIM coverage. CP 94.

Viking denied Andrew's claim for UIM coverage based on the amended definition of "You" contained in the Endorsement.

B. Motion Practice in Trial Court

After Viking's denial of coverage, Jennifer Helgeson served the Office of the Insurance Commissioner and Viking with her intent to file a lawsuit and the basis of her cause of action, pursuant to RCW 48.30.015(8)(a). On May 17, 2010, Mrs. Helgeson and her son, Andrew, filed suit against Viking Insurance Company for breach of contract and violation of the IFCA. CP 1-7. The suit alleged that Viking's denial of UIM coverage to Andrew was in breach of its insurance contract and violated the Insurance Fair Conduct Act. The Helgesons served Viking through the Office of the Insurance Commissioner pursuant to RCW 48.05.200 and RCW 48.05.210. CP 8-9.

On the same day as the Helgesons filed suit, Viking Insurance filed suit against the Helgesons seeking declaratory judgment that it did not have a duty to pay benefits under the UIM coverage of the Policy. CP 221-225. The Helgesons accepted service of Viking's lawsuit. CP 226.

By stipulation and order, the two cases were consolidated into one action since they involved a common question of law. CP 14-15. Since there were no facts in dispute, the Helgesons and Viking agreed to bring cross-motions for summary judgment noted for hearing on October 1,

2010.¹ The cross-motions were heard by the Honorable Leila Mills of the Kitsap County Superior Court. On October 18, 2010, Judge Mills issued the Orders on Motions for Summary Judgment granting Viking's motion for summary judgment and dismissing the Helgeson's claims against Viking. CP 209-212.

The Helgesons filed and served their Notice of Appeal of this decision on October 18, 2010. CP 207-212.

V. ARGUMENT

A. Standard of Review – De Novo

Summary judgment is reviewed de novo on appeal. Brutsche v. City of Kent, 164 Wn.2d 664, 671, 193 P.3d 110 (2008); Osborn v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Evidence is construed in the light most favorable to the nonmoving party. Osborn, 157 Wash.2d at 22. The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. Olympic Fish Prod., Inc. v. Lloyd, 93 Wn.2d 596, 602, 611 P.2d 737

¹ The Helgesons included a claim in their motion for summary judgment for the amount of damages suffered by Andrew Helgeson. Prior to the hearing, the Helgesons conceded that Viking raised material issues of fact regarding the extent of damages. CP 189. This issue was not heard at the summary judgment motion hearing.

(1980); Johnson v. Rothstein, 52 Wn. App. 303, 307, 759 P.2d 471 (1988).

The trial court's function is to determine whether a genuine issue of material fact exists. Summary judgment should be granted if the pleadings, exhibits, and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. LaPlante v. State, 85 Wn.2d 154, 531 P. 2d 299 (1975); CR 56 (c).

The validity of an insurance contract is a question of law. Safeco Ins. Co. of Ill. v. Automobile Club Ins. Co., 108 Wn. App. 468, 472, 31 P.3d 52 (2001).

B. The insurance policy Viking sold Mrs. Helgeson includes UIM Coverage.

Washington's UIM statute requires that all automobile insurance policies issued in Washington State contain UIM coverage in the same amount as the liability coverage of the insurance policy. RCW 48.22.030 (2), (3). Although a named insured may reject UIM coverage, such rejection must be in writing, signed by the named insured. RCW 48.22.030(3); Clements v. Travelers Indem. Co., 121 Wn.2d 243, 254-55, 850 P.2d 1298 (1993).

Although Mrs. Helgeson did not pay a separate premium for UIM coverage, Viking does not have a written rejection of UIM coverage for

Mrs. Helgeson. CP 90. Because Viking does not have a written rejection of UIM coverage for Mrs. Helgeson, Viking concedes for the purposes of summary judgment that the policy which it sold Mrs. Helgeson includes UIM coverage. CP 94.

C. The Broad Form Named Driver Endorsement issued by Viking excludes the mandatory UIM coverage required under RCW 48.22.005

The Endorsement² in the insurance policy Viking sold Mrs. Helgeson violates express statutory language. Although insurance companies are permitted to limit their liability, a limitation in an insurance contract which violates statutory language or public policy is invalid. Mendoza v. Rivera-Chavez, 140 Wn.2d 659, 662, 999 P.2d 29 (2000).

² Broad form named driver endorsements generally operate to broaden, not narrow, insurance coverage by providing the named insured *additional* coverage when she operates any vehicle. See Washington Motor Vehicle Accident Insurance Deskbook § 2.2(7) (Washington State Bar Association 2nd ed. 2009). As explained in the Washington Motor Vehicle Accident Insurance Deskbook:

“For an additional premium, an insured can purchase a broad form named operator (BFNO) endorsement. This endorsement amends the liability insuring agreement to provide the named insured with liability coverage for his operation of any vehicle. Normally, BFNO coverage does not apply to permissive users and is *in excess to any other valid and collectable coverage applicable to a vehicle.*” (emphasis added).

1. The Endorsement violates express statutory language.

By excluding family members from the definition of insured person, the Endorsement in the policy Viking sold to Mrs. Helgeson violates the express language of RCW 48.22.005(5).

RCW 48.22.005 defines terms which are applicable throughout chapter 48.22. Chapter 48.22 contains both the personal injury protection (PIP) statute, RCW 48.22.085, and the UIM statute, RCW 48.22.030. Thus, the definitions in RCW 48.22.005 apply to both PIP coverage and UIM coverage. RCW 48.22.005(5)(a) defines “insured” as “[t]he named insured or a person who is a resident of the named insured’s household and is...related to the named insured by blood, marriage, or adoption.” The legislature has therefore, mandated that PIP coverage and UIM coverage extend at least to the named insured and the family members who reside with the named insured. *See also* Washington Motor Vehicle Accident Insurance Deskbook § 5.3 (Washington State Bar Association 2d ed. 2009).

The Endorsement in the Helgesons' insurance policy violates RCW 48.22.005(5) because the Endorsement attempts to limit the definition of who is insured under the entire policy, including PIP and UIM coverage, to *only* the named insured. Although there are limited instances where a family member would be covered under the Viking policy sold to Mrs.

Helgeson (such as when riding as a passenger in a car driven by Mrs. Helgeson) family members are generally excluded from coverage. Because the express terms of RCW 48.22.005 (5)(a) require Viking to extend at least PIP and UIM protection to family members residing with the named insured, and because the Endorsement generally excludes family members from insurance coverage, the Endorsement violates RCW 48.22.005(a).

2. The definitions in RCW 48.22.005 are incorporated into Washington State's UIM statute.

A plain reading of RCW 48.22.005 indicates that the Legislature intended the definitions in RCW 48.22.005 to apply to the UIM statute, RCW 48.22.030. Statutory interpretation begins with the plain meaning of the statute. State v. Eaton, 168 Wn.2d 476, 489, 229 P.3d 704 (2010). One is to look not only to the statute at hand, but to related statutes when engaging in a plain meaning analysis. Columbia Physical Therapy, Inc., P.S., v. Benton Franklin Orthopedic Assocs., PLLC, 168 Wn.2d 421, 432-33, 228 P.3d 1260 (2010). Only if the Legislature's intent cannot be determined from the face of the statute, if the statute is ambiguous, or if the statute's plain meaning "would yield absurd results" is one to look beyond the statute's face to determine legislative intent. Id. at 432; Eaton, 168 Wn.2d at 489-90. Multiple statutes which deal with the same subject

matter are to be read in harmony with each other as much as possible. Columbia Physical Therapy, 168 Wn.2d at 433. Reading related statutes harmoniously uncovers the entire statutory scheme and “maintains the integrity of the respective statutes.” In re Estate of Kerr, 134 Wn.2d 328, 336, 949 P.2d 810 (1998).

The legislative intent behind RCW 48.22.005 can be determined by the plain meaning of the statute and related statutes. RCW 48.22.005 begins by stating, “[u]nless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.” Thus, the text of RCW 48.22.005 clearly indicates the Legislature’s intent that the statute’s definitions apply throughout RCW 48.22, unless the context otherwise requires.

Under the principles of statutory interpretation, RCW 48.22.030 and RCW 48.22.005 are to be read in harmony as part of the same statutory scheme. Reading RCW 48.22.030 in harmony with the definitions in RCW 48.22.005 indicates that the definition of insured in RCW 48.22.005(5) be read into the words “persons insured thereunder.” The definition of insured in RCW 48.22.005(5) is thus incorporated into the UIM statute.

D. Established public policy in Washington State prohibits denial of UIM coverage to minor children of a named insured

In addition to violating express statutory language, the Endorsement violates public policy. Insurance contract provisions which violate public policy must be declared invalid. Greengo v. Pub. Emp. Mut. Ins. Co., 135 Wn.2d 799, 806, 959 P.2d 657 (1998); Dairyland Ins. Co. v. Uhls, 41 Wn. App. 49, 52, 702 P.2d 1214 (1985). To determine whether the provisions in an insurance contract violate public policy, courts are to look to particular statutes for guidance. Mendoza, 140 Wn.2d at 663. The relevant statute in the case of UIM coverage is RCW 48.22.030 (the “UIM statute”), which requires automobile insurance carriers to include UIM coverage as part of an automobile insurance policy, unless the insured rejects such coverage in writing. Greengo, 135 Wn.2d at 808-09; Safeco, 108 Wn. App. at 474; RCW 48.22.030 (2), (4).

It is well established that the public policy underlying RCW 48.22.030 is the creation of a second, floating layer of protection for automobile accident victims. Greengo, 135 Wn.2d at 806. The Washington Supreme Court has declared that RCW 48.22.030 should be “liberally construe[d]” to ensure that the underlying public policy “is neither whittled away nor eroded.” Id.

Under this framework, Washington State courts have consistently held that insurance contract provisions which foreclose an automobile accident victim's only source of UIM coverage are void as against public policy. *See, e.g., Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 111, 795 P.2d 126 (1990); *Greengo*, 135 Wn.2d at 811; *Safeco*, 108 Wn. App at 474; *Mut. of Enumclaw Ins. Co. v. Wiscomb (Wiscomb II)*, 97 Wn.2d 203, 211-13, 643 P.2d 441 (1982).

1. The Endorsement is contrary to the public policy behind Washington State's UIM statute because the Endorsement forecloses Andrew's only source of UIM coverage.

Insurance contract provisions which operate to deny an accident victim's only source of UIM coverage violate the UIM statute's public policy of assuring that automobile accident victims have a second, floating layer of financial protection. *Tissell*, 115 Wn.2d at 119-21.³

For example, in *Tissell* the Washington Supreme Court invalidated language in an insurance contract which purported to deny UIM coverage when the insured was occupying a vehicle which was also covered by the liability portion of the insurance policy. *Id.* at 109. The *Tissell* court invalidated this provision because it undermined the UIM statute's public

³ The two-justice lead opinion in *Tissell* improperly stated that the public policy underlying the UIM statute is full compensation. The seven-justice concurrence identified the lead opinion's error, and properly stated the underlying public policy of RCW 48.22.030 is to provide a second, floating layer of protection for automobile accident victims. *Tissell*, 115 Wn.2d at 120. *See also, Greengo* 135 Wn.2d at 809-10.

policy of assuring that automobile accident victims receive a second layer of floating protection. Id. at 120-21. The Tissell court explained that although the same insurance contract provision when applied to third-party passengers was upheld in Miller Cas. Ins. Co. v. Briggs, 100 Wn.2d 1, 665 P.2d 891 (1983), the provision could not be upheld when applied to the named insured and her family members. Tissell, 115 Wn.2d at 111, 118-120. The insurance contract provision was declared invalid as it applied to the named insured and her family members because the provision: (1) allowed the insurance company to gain a financial windfall by charging a separate premium for UIM coverage that was invalidated by the insurance company's own contract; (2) prevented the named insured and her family members from receiving any UIM coverage, and; (3) foreclosed the only possible source of UIM coverage for the named insured and her family members. Id. at 119.

The Washington State Supreme Court later clarified the majority's reasoning in Tissell, explaining that "the dispositive criterion in Tissell was whether the policy exclusion would operate to foreclose any possibility of UIM recovery. By foreclosing the plaintiff's only source of UIM benefits, the exclusion [in Tissell] would have undermined the public policy of providing a second layer of recovery." Greengo, 135 Wn.2d at 811.

Similar to the insurance contract provision at issue in Tissell, the Endorsement in the insurance contract Viking sold Mrs. Helgeson is invalid because it prevents Andrew from receiving any UIM coverage, and because it forecloses Andrew's only possible source of UIM coverage.

Like the provision at issue in Tissell, the Endorsement prevents Andrew from receiving any UIM coverage. Like the plaintiff in Tissell, Andrew has not received UIM coverage from the tortfeasor's insurance policy. Andrew is thus left without any UIM coverage. And just as the insurance provision at issue in Tissell foreclosed the plaintiff's only source of UIM benefits because she could not contract elsewhere for UIM coverage, so does the Endorsement foreclose Andrew's only source of UIM benefits. Andrew cannot contract elsewhere for insurance coverage because he was a minor at the time relevant to this action.

While it is true that unlike the insurance company in Tissell, Viking did not receive a financial windfall because Mrs. Helgeson did not pay a separate premium for UIM coverage, this does not change the fact that the Endorsement violates the UIM statute's public policy. Under the "dispositive criterion" identified by the Washington State Supreme Court, the Endorsement is void as against public policy because it operates to foreclose Andrew's only source of UIM benefits.

2. The fact that the Endorsement applies to both the UIM and liability portions of Mrs. Helgeson's insurance contract and the fact that Mrs. Helgeson may have known about the Endorsement and freely entered into the insurance contract are irrelevant.

Even an insurance contract provision that is applied consistently throughout an entire insurance policy and is freely entered into will not be upheld if the exclusion is against public policy. Dairyland, 41 Wn. App. 49,⁴

At issue in Dairyland Ins. Co. v. Uhls was a restriction in an insurance policy issued by Dairyland to Darrell Uhls which read:

DRIVER RESTRICTION--IMPORTANT--READ CAREFULLY I understand and agree that the Insurance policy I am requesting will not apply while the automobile insured is being driven by any person under the age of twenty-five, unless such person is named on this application and on the policy.

41 Wn. App. at 51.

An automobile collision occurred in a vehicle being driven by William Uhls, Darrell Uhls's brother, and in which Darrell Uhls and Tony Simas were passengers. William Uhls was 24 at the time of the collision. Dairyland denied uninsured motorist coverage (UMC), citing the above restriction.⁵ Dairyland argued that the restriction was valid

⁴ It should be noted, that Dairyland is the same company as Viking. Dairyland and Viking are both part of the Sentry insurance group. See <http://www.sentry.com/Corporate/Legal.aspx>.

⁵ This case dealt with former RCW 48.22.030, the former uninsured motorist coverage statute. Although the public policy behind the former RCW 48.22.030 was different

because it “consistently applied to both bodily injury liability and uninsured motorist coverages,” and because the named insured “knew about the restriction and freely entered into the insurance contract.” Id. at 53-54. The Washington State Division II Court of Appeals rejected both arguments, explaining that because the restriction “exclude[d] coverage when the insured was injured in a certain situation,” and because the named insured did not reject UMC coverage in its entirety, the restriction was contrary to the policy behind the UMC statute⁶ and could not be used to deny the mandated UMC coverage. Id. at 54-55. The fact that the restriction applied consistently throughout the insurance contract, and the fact that the insurance contract with the restriction was freely entered into were irrelevant. Id. The court thus invalidated the restriction as it applied to UMC coverage. Id. at 55.

Similar to the restriction in Dairyland, the Endorsement in the Policy Viking sold Mrs. Helgeson is contrary to public policy. As explained above, the Endorsement is contrary to the public policy behind the UIM statute because it forecloses Andrew’s only source of UIM coverage. *See above* at V(D)(1). Under the holding in Dairyland, the

than the public policy behind the current UIM statute, the rules governing insurance policy exclusions are the same. *See Dairyland*, 41 Wn. App. at 52.

⁶ The public policy behind the former UMC statute was to “provid[e] broad protection against financially irresponsible motorists.” Dairyland, 41 Wn. App. at 52.

fact that the Endorsement is applied consistently throughout Mrs. Helgeson's insurance policy, and the fact that Mrs. Helgeson may have known about the Endorsement and still chose to enter into the insurance contract with Viking are irrelevant. Because the Endorsement is contrary to public policy and impermissibly restricts UIM coverage, the Endorsement is invalid at least as it applies to UIM coverage.

E. Established public policy in Washington State prohibits family member exclusions in insurance contracts

Family member exclusions in insurance contracts are invalid in Washington State because such exclusions contravene the public policy behind Washington State's statutory scheme of insurance legislation. Wiscomb II, 97 Wn.2d at 214.

In addition to the UIM statute, RCW 48.22.030, Washington State's Financial Responsibility Act, RCW 46.29, and Washington State's Mandatory Liability Insurance Act, RCW 46.30, make up this state's insurance legislation scheme. Wiscomb II, 97 Wn.2d at 208. The public policy which "pervades [Washington State's] entire scheme of insurance legislation" is to assure that innocent victims of automobile accidents receive financial protection and compensation." Id. at 206-08. Family member exclusions are invalid in Washington State because these

exclusions contravene the public policy in favor of assuring protection for victims of automobile accidents. Id. at 213.

In Wiscomb II, the Washington State Supreme Court invalidated an insurance contract provision which excluded insurance coverage for “bodily injury to the insured or any member of the family of the insured residing in the same household as the insured.” Id. at 204, note 1. The Wiscomb II court reasoned that the exclusion contravened public policy because it, “exclude from protection an entire class of innocent victims for no good reason.” Id. at 208. The court went on to explain that insurance contract provisions which deny family members insurance coverage are particularly troublesome because these provisions deny coverage to the minor children of the named insured. Id. at 211-13. Because a minor cannot contract elsewhere for insurance coverage, the family member exclusions leaves the minor child uncovered or inadequately covered if the tortfeasor is the child’s parent or if the child is injured by an underinsured vehicle. Id. at 212-13. This effect undercuts Washington State’s public policy of assuring that innocent victims of automobile accidents receive financial protection and compensation. Id. at 213. The court thus held that family member exclusions must be declared void as against public policy. Id.

The Endorsement in this case is impermissible family member exclusion. Like the exclusion at issue in Wiscomb II, the Endorsement at issue in this case excludes the named insured's family members, including the named insured's minor child, from receiving insurance coverage. While it is true that, unlike the exclusion in Wiscomb II, the Endorsement in this case is not called an "exclusion" and the Endorsement does not deny the named insured from receiving insurance coverage, the Endorsement still has the impermissible effect of excluding the named insured's family members, including minor children from insurance coverage.

Because the Endorsement has the same impermissible effect as the exclusion in Wiscomb II of denying minor children insurance coverage, the Endorsement violates Washington State's public policy of assuring that innocent victims of automobile accidents receive financial protection and compensation. The Endorsement must therefore, be declared void as against public policy.

F. Viking's conduct violates the Insurance Fair Conduct Act.

The Insurance Fair Conduct Act is codified in RCW 48.30.015.

This Act states, in relevant part:

- (1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits

by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

(3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

RCW 48.30.015(1)-(3).

An insurer who misrepresents policy provisions is in violation of the Insurance Fair Conduct Act. RCW 48.30.015(5)(b).

Misrepresentation of policy provisions includes:

(1)...fail[ing] to disclose to first party claimants all pertinent benefits, coverages, or other provisions of an insurance policy or insurance contract under which a claim is presented.

(2)...conceal[ing] from first party claimants benefits, coverages, or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

WAC 284-30-350 (1), (2).

By denying Andrew Helgeson insurance coverage based on an Endorsement that is both against statutory language and public policy, Viking both failed to disclose all benefits which are in fact available to

Andrew and concealed from Andrew the fact that UIM benefits are in fact available to him. Viking is therefore in violation of the Insurance Fair Conduct Act.

VI. REQUEST FOR ATTORNEY FEES AND COSTS

An insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees. Olympic Steamship Co., Inc v. Centennial Ins., 117 Wn.2d 37, 54, 811 P.2d 673 (1991).

The Helgesons are also entitled to an award of attorney fees and treble damages for Viking's violation of the Insurance Fair Practices Act under RCW 48.30.015(1) & (3).

The Helgesons are also entitled to an award of costs and statutory attorney fees pursuant to RCW 4.84.010 et seq.

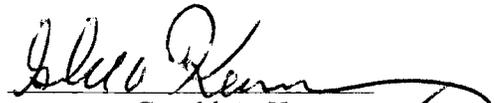
VII. CONCLUSION

Viking's denial of UIM benefits to Andrew Helgeson is in violation of the express statutory language of RCW Chapter 48.22 and well established public policy in Washington State. Further, Viking's denial of UIM benefits to Andrew Helgeson is unreasonable and a violation of the Insurance Fair Conduct Act. The Helgesons are entitled to an award of costs and attorney fees pursuant to Olympic Steamship, the

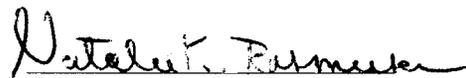
IFCA and RCW 4.84.010 et seq. Further, the Helgesons are entitled to treble damages pursuant to the IFCA.

For the reasons set out above, Jennifer Helgeson and Andrew Helgeson respectfully request that the Court of Appeals reverse the trial court's decision granting Viking Insurance Company's Motion for Summary Judgment. The Helgesons further request that this Court grant their Motion for Summary Judgment: (1) voiding the Broad Form Named Driver Endorsement contained in the Viking Policy; (2) finding Viking in breach of its insurance contract with Jennifer Helgeson; (3) declaring that Viking is in violation is in violation of the Insurance Fair Conduct Act; and (4) awarding the Helgesons the costs and attorney fees of this action.

Respectfully submitted this 20th day of December, 2010.



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NO. 41371-0-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

CONSOLIDATED CASES

JENNIFER HELGESON and ANDREW HELGESON,
Appellants,

v.

VIKING INSURANCE COMPANY OF WISCONSIN, a foreign corporation,
d/b/a SENTRY INSURANCE, d/b/a, DAIRYLAND INSURANCE,

Respondent.

VIKING INSURANCE COMPANY OF WISCONSIN, a foreign corporation,
Respondent,

v.

JENNIFER HELGESON and JOHN DOE HELGESON, and their marital
community, and ANDREW HELGESON,
Appellants.

DECLARATION OF SERVICE

10 DEC 21 AM 11:43
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

DECLARATION OF SERVICE

I hereby certify, under penalty of perjury of the laws of the State of Washington, that on this date I delivered true and correct copies of the within documents and the following additional documents:

1. Brief of Appellant

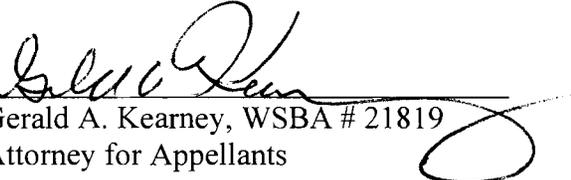
To the following attorney of record:

Patrick Paulich
Attorney at Law
1300 Puget Sound Plaza
1325 Fourth Avenue
Seattle WA 98101

on December 20, 2010 by United States Mail

I declare under oath and penalty of perjury that the foregoing statements are true and accurate.

SIGNED at Kingston, Washington on this 20th day of December, 2010.


Gerald A. Kearney, WSBA # 21819
Attorney for Appellants